

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 400 CLC (KROGER STORE NO.755)
(Respondent)

and

Case 06-CB-222829

SHELBY KROCKER, an Individual
(Charging Party)

Julie Polakoski-Rennie, Esq.,
for the General Counsel.

John Durkalski, Esq. and Carey R. Butsavage, Esq.,
for the Respondent.

Allyssa K. Hazelwood, Esq. and Aaron B. Solem, Esq.,
for the Charging Party

DECISION

STATEMENT OF THE CASE

Robert A. Giannasi, Administrative Law Judge. This case was submitted to me on a stipulated record, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The complaint, as amended, alleges that Respondent violated Section 8(b)(1)(A) of the Act by maintaining a single three-part dues checkoff authorization form for employees to sign that is confusing and ambiguous and fails to clearly provide information to employees in order for them to make an informed decision on union membership and dues checkoff. In particular, it is alleged that the form contains the phrase "Must Be Signed" that negates the voluntary nature of the dues checkoff authorization, does not contain clear language informing signers about revocation of the dues checkoff authorization, and contains language that requires signers to give Respondent authority to transfer the checkoff obligations to a new employer, not limited to a successor employer. The complaint also alleges that Respondent violated Section 8(b)(1)(A) by rejecting the Charging Party's request to revoke her dues deduction authorization, asserting that the request was untimely and failing to inform her of the actual dates within which to timely request a revocation of her dues checkoff authorization. The Respondent filed an answer denying the essential allegations in the complaint.

All parties filed post-hearing opening and reply briefs, which I have read and considered. Based on those briefs, the stipulations, and the entire record in this case, I make the following:

FINDINGS OF FACT

I. Jurisdiction

It is stipulated that Respondent (the Union) is a labor organization within the meaning of Section 2(5) of the Act. It is also stipulated that Kroger Mid-Atlantic Division (the Employer) is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. Alleged Unfair Labor Practices

The Facts¹

Background

The Employer, a limited partnership with an office and place of business in Morgantown, West Virginia, operates retail grocery stores. The Respondent Union is the exclusive bargaining representative of the following employees of the Employer, pursuant to Section 9(a) of the Act:

All employees except Store Managers, Co-Managers, Pharmacists and other managerial or clerical employed in the stores of the Employer which are operated in the Charleston, West Virginia Area of Kroger Mid-Atlantic.

The Employer and the Union are parties to a collective bargaining agreement (CBA), which is effective by its terms from October 8, 2017 to August 29, 2020 and contains a union security clause.

Respondent maintains a single three-part form containing a "Membership Application," a "Voluntary Check-Off Authorization," and a "UFCW Local 400 ABC Payroll Deduction Authorization Form." Both sides of the heading in the check-off authorization form, which reads "Voluntary Check-Off Authorization To Any Employer Under Contract with United Food & Commercial Workers Local 400," contained the phrase "MUST BE SIGNED" in a larger font than the heading, underlined and in all capital letters. The check-off authorization form also states:

The Secretary-Treasurer of Local 400 is authorized . . . to deposit this this authorization with any Employer under contract with Local 400 in the event I should change employment or to the same employer if I return to work after hiatus

¹ All facts set forth below are based on the stipulation of the parties and the attached exhibits that are hereby received in evidence as part of the stipulation.

The checkoff authorization further states that it is

5 irrevocable for a period of one year from the date of execution or until the
termination date of the agreement between the Employer and Local 400,
whichever occurs sooner, and from year to year thereafter, regardless of
union membership, unless not less than thirty (30) days and not more than
forty-five (45) days prior to the end of any subsequent yearly period or the
10 termination of the collective bargaining agreement between the Union and
my employer.

On September 2, 2017, the Charging Party executed the membership application
and the checkoff authorization portions of Respondent's three-part form but did not
execute the payroll deduction form. Thereafter, in September 2017, West Virginia
15 enacted its Workplace Freedom Act and became a right-to-work state.

On about March 5, 2018, the Charging Party sent two identical letters to the
Employer and one to Respondent asking to resign her membership and stop her dues
deductions. On March 29, Respondent replied in a letter stating that, while she was no
20 longer a member, she was bound to pay dues until she properly revoked her dues
authorization during one of the specified window periods set forth in the check-off
authorization. The Respondent pointed out that the revocation was untimely,
specifically stating that, according to the authorization she signed, such notice had to be
given "no less than 30 day and not more than 45 days prior to the date you signed your
25 membership application, which is September 2, 2017 (copy enclosed) or the termination
of the collective bargaining agreement." Stipulation Exh. 5.

On June 27, the Charging Party filed her initial charge in this case alleging that
dues continued to be deducted from her pay despite her wishes in violation of Section
30 8(b)(1)(A). In September 2018, Respondent refunded to the Charging Party the dues
collected from her since her March 5, 2018 revocation letter.

In late 2018, Respondent made some changes to its three-part form. It removed
the "Must Be Signed" language from the checkoff authorization form. But the form still
35 contains that language cited above authorizing the Secretary-Treasurer of the Union to
refer the dues authorization form to other employers. The revised form also contains
the following language on the irrevocable period for the dues check-off authorization as
a substitute for the relevant language cited above in the old form. The authorization is
now:

40 irrevocable for the period of one year from the date I sign this authorization or
until the termination of the applicable collective agreement between Local 400
and my employer, whichever occurs sooner, and I agree and direct that this
authorization shall be automatically renewed, and shall be irrevocable for
successive one-year periods or for the period of each succeeding applicable
45 collective agreement, whichever shall be shorter. To revoke this authorization, I
agree that I will give written, signed notice to Local 400 and my employer not
more than 45 days and not less than 30 days prior to (i) the end of the initial or

any successive one-year period, or (ii) the termination of my initial or any successive collective agreement, whichever occurs sooner.

The Issues

The parties stipulate that the issues to be resolved in this case are whether the use of the three-part form, the language in the checkoff authorization form, and the response to the Charging Party's efforts to revoke her dues checkoff authorization "restrained and coerced" employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act.²

Discussion and Analysis

General Principles

First, some general principles: "Section 7 protects both the right to refrain from belonging to a union and the right to refrain from contributing money to it [with the exception of the requirement in a valid union security clause requiring membership as a condition of employment]." *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327 (1991). In *Lockheed*, the Board set forth a number of other principles relating to checkoff authorizations. Under Section 302(c)(4), such authorizations are considered contracts between the employee and the employer. But they have an assignment feature. The employee agrees to have dues withheld from his or her wages and sent to the union for representation purposes. The Board has also made clear that these authorizations are voluntary and may be extinguished by the employee upon resignation from the union, absent a clear and unmistakable waiver. And a union that prevents the employee from stopping a dues checkoff upon resignation is considered to have violated Section 8(b)(1)(A) by restraining or coercing employees in the exercise of Section 7 rights. 302 NLRB at 327-330. See also *Local 58 IBEW (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. 3 (2017).

Union communications with employees about dues requirements can be considered a violation of Section 8(b)(1)(A) if the language used "could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Service Employees Local 121 RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 235-236 (2010).

The Board also views a violation of a union's duty of fair representation to the employees it represents as a violation of Section 8(b)(1)(A). *Vaca v. Sipes*, 386 U.S. 171, 176 (1967). That duty is also enforceable in other fora and that is the context in which the Supreme Court defined the duty of fair representation in *Vaca v. Sipes*. The Court stated that the duty requires a union bargaining agent to treat the employees it represents in a manner that is not arbitrary, discriminatory or in bad faith. 386 U.S. at 190. Bad faith in this respect is more than mere negligence. It requires proof that "the union acted with improper intent, purpose, or motive encompassing fraud, dishonesty,

² The statutory language is actually "restrain or coerce."

or other intentionally misleading conduct.” *Auto Workers Local 600 v. NLRB*, ---F.3d---, 2020 WL 18425290 (6th Cir., April 13, 2020), citing and quoting from authorities.

In condemning the Respondent’s conduct in this case, the General Counsel invokes both the alleged restraint or coercive nature of the Respondent’s conduct and the alleged violation of its duty of fair representation.³ The overview section of the General Counsel’s opening brief (Br. 9-11) seems to suggest that ambiguous language such as that used by Respondent in this case is, in and of itself, tantamount to a violation of its duty of fair representation and also amounts to restraint or coercion under Section 8(b)(1)(A). Even apart from the apparent attempt to conflate the two theories advanced, the General Counsel’s position is nowhere supported in the case law cited in the brief or even in the duty of fair representation itself. As indicated above, a union fails in its duty of fair representation if it acts in a manner that is arbitrary, discriminatory or in bad faith, the latter having an intent or motivational aspect to it.

The General Counsel’s ambiguity add-on to the duty is based on an unduly expansive reading of *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993). In *Paramax*, the Board found a violation because the union was found to have acted in bad faith in maintaining a union security clause requiring unit employees to become “members in good standing,” without additionally informing them that their continued employment under the union security clause was satisfied by simply tendering uniform initiation fees and dues under *NLRB v. General Motors*, 373 U.S. 734, 742 (1963). *Id.* at 1040. The Board’s decision was denied enforcement because, according to the court of appeals, the union’s notification failure was not in bad faith. 41 F.3d 1532 (D.C. Cir. 1994). But even taking the Board’s *Paramax* decision on its merits, the union’s conduct did not involve an ambiguity, as the General Counsel contends, but rather an outright omission of important rights that amounted to a misrepresentation. The Board also observed that the union’s omission affected retention of employment and the Section 7 right to refrain from full membership. 311 NLRB at 1040.

The other cases cited by counsel for the General Counsel in the overview section of her brief do not involve the duty of fair representation but rather union omissions that also amounted to misrepresentations. *Inland Shoe Mfg.*, 211 NLRB 724 (1974) was not even an unfair labor practice case. That was a post-election objections case where the employer alleged that the union interfered with an election, in which the employees chose the union to represent them, by misrepresenting in a flyer distributed to voters that dues and initiation fees would be waived for “charter members,” which was nowhere explained in the flyer or in other respects. The Board upheld the objection and ordered a new election. The other cases involved the attempt by unions to have employees discharged for failing to pay dues where the employees were not fully informed of their dues obligations. See *NLRB v. Hotel, Motel and Club Employees’ Union, Local 568 (Philadelphia Sheraton)*, 320 F.2d 254, 258 (3d Cir. 1963); and

³ This is so even though a violation of the duty of fair representation is not specifically pled in the complaint as a source of the violation. The Charging Party does not advance the duty of fair representation theory in its briefs.

Distillery, Rectifying, Wine and Allied Workers, Local 38 (Schenley Distillers), 242 NLRB 370 (1979), enfd. 642 F.2d 185 (6th Cir. 1981).⁴

I cannot accept the General Counsel's assertion that language ambiguity alone in union communications or documents amounts to either a violation of the duty of fair representation or restraint or coercion under Section 8(b)(1)(A). But, in any event, the union's language in this case is not ambiguous—at least not so ambiguous as to amount to unlawful restraint or coercion or bad faith. Nor is it anywhere near the conduct found unlawful in the cases cited by the General Counsel.⁵

Applying the above principles and observations and considering that the General Counsel has the affirmative burden of proving all alleged violations, I now turn to an analysis of the specific allegations in the complaint.

The Three-Part Form Format and the “Must Sign” Language

The General Counsel alleges (Br.11-12) that the “Must Sign” language in the dues check-off authorization negates the language in the heading of the authorization that states its voluntary nature. The General Counsel also alleges (Br. 14-15) that the format and language used in the three-part form is confusing to employees. According to the General Counsel, this amounts to coercion of employees in the exercise of their Section 7 right not to join or support a union.

In support of each of the above allegations, the General Counsel cites *Pomona Valley Hospital Medical Center*, cited and discussed above, where the Board found that the union violated Section 8(b)(1)(A) by distributing flyers that threatened employees with adverse consequences if they failed to continue to pay dues and fees under an expired union security clause. 355 NLRB at 236-237. The Board determined that the language used “could reasonably be construed as coercive” (id. at 236) because it required employees to pay dues beyond the expiration of the union security clause and, if they did not, additional amounts in a lump sum. Id at. 237.

⁴ For its part, Respondent counters in its opening brief (Br. 5) that dues checkoff authorizations are basically internal union matters that do not implicate Section 8(b)(1)(A) unless they affect an employee's employment status or are contrary to an overriding policy contained in national labor law, citing to a General Counsel's memo which in turn cites to *Automotive & Allied Industries Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865, 866 (1997). That does not in any way offer a standard different than the restraint or coercion or the fair representation standards discussed above, although it does impose somewhat of a limit on what should be considered an internal union matter.

⁵ In the earlier cited *Auto Workers Local 600* decision of the Sixth Circuit, the Court rejected the Board's restraint or coercion basis for the violation. But it upheld the Board's finding of a violation of the duty of fair representation based on the bad faith of the union. The union had “intentionally” ignored a dues revocation request and “responded reproachfully” to the request. The situation in this case is nowhere close to the union's conduct in the *Auto Workers Local 600* case.

The “Must Sign” notation is far short of the explicit language in a separate document used by the respondent in *Pomona Valley*. The notation here did not contradict the heading of the dues checkoff form that clearly stated it was voluntary. Nor was there a threat of consequences for failing to pay dues like there was in *Pomona Valley*. There was no coercion either in the language on the form or extraneously in a separate communication. Moreover, as Respondent points out, a West Virginia statute requires that authorizations for deductions from employee pay must be in written form. That benign objective reasonably explains the “Must Sign” language. Accordingly, I dismiss the allegation that the “Must Sign” language in paragraph 9(b) of the complaint violates Section 8(b)(1)(A).⁶

As to the alleged confusing language and format in the three-part form, I find that there is nothing confusing in the use of the form and certainly not enough to amount to restraint or coercion. The three-part format is an efficient way to obtain the necessary information from employees on multiple related matters. And the requirements are sufficiently differentiated so employees can reasonably distinguish the separate authorizations necessary. I can see no violation in either the original or the subsequent three-part form whether it is alleged as restraint or coercion or a violation of the duty of fair representation.

Thus, I find that the General Counsel has not proved by a preponderance of the evidence that Respondent has violated Section 8(b)(1)(A) by use of its three-part form or by use of the words “Must Sign” alongside the heading of the dues check-off authorization clearly stating that the authorization is voluntary.

Alleged Ambiguous Terms

Section 302(c)(4) permits dues checkoffs pursuant to written authorizations from employees, provided, in relevant part, that the authorizations “shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.” The General Counsel alleges that both the original and the revised forms contain the following ambiguous language: “Year to year thereafter,” “subsequent yearly period,” and “whichever occurs sooner.” Br. 17. I reproduce the forms below with the alleged objectionable phrases highlighted.

The original language is as follows:

irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 400, **whichever occurs sooner**, and from **year to year thereafter**, regardless of

⁶ In support of this part of the case (Br. 11-12) the General Counsel also cites the Supreme Court’s opinion in *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). I fail to see the relevance of that case to the allegation at issue in this case. In *Pattern Makers*, the Court approved the Board’s ruling that a union which fined employees who tendered resignations amounted to coercion under Section 8(b)(1)(A). Apart from the fact that the real issue in *Pattern Makers* was whether the union’s action was permitted by the proviso to Section 8(b)(1)(A), the benign language used here can hardly be equated with a union fine.

union membership, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any **subsequent yearly period** or the termination of the collective bargaining agreement between the Union and my employer.

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The revised language is as follows:

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irrevocable for the period of one year from the date I sign this authorization or until the termination of the applicable collective agreement between Local 400 and my employer, **whichever occurs sooner**, and I agree and direct that this authorization shall be automatically renewed, and shall be irrevocable for successive one-year periods or for the period of each succeeding applicable collective agreement, whichever shall be shorter. To revoke this authorization, I agree that I will give written, signed notice to Local 400 and my employer not more than 45 days and not less than 30 days prior to (i) the end of the initial or any successive one-year period, or (ii) the termination of my initial or any successive collective agreement, **whichever occurs sooner**.

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The question is whether the highlighted phrases distort the requirements of Section 302(c)(4) in such a way as to restrain or coerce an employee in the right to revoke his or her authorizations when appropriate. The General Counsel has not persuasively shown such restraint or coercion. Nor has the General Counsel shown a violation of the duty of fair representation. There was no misrepresentation or bad faith in the language used. Nor was there any ambiguity that would even imply a distortion of the statutory requirements. Indeed, the statute itself uses the phrase “whichever occurs sooner,” a phrase that is necessary because the statute sets forth 2 different annual periods for proper revocations. It is thus natural for the authorization to likewise refer to 2 different annual periods for proper revocations. When read in context the meaning of the alleged objectionable language is plain, reasonable and in no way impermissible. Accordingly, this allegation of the complaint is dismissed.

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The Transferability Issue

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The General Counsel alleges (Br. 12) that the language in the checkoff form that permits the employee to authorize that dues may be withheld by other employers with whom Respondent has a contract amounts to restraint or coercion. The General Counsel’s position is that a new form is required for “each employer with whom a union member is employed.” In support of that position, the General Counsel cites *Kroger Co.*, 334 NLRB 847 (2001). But that case does not support the General Counsel’s position. Indeed, as Respondent points out (R. Br. 9), the case supports the Respondent’s position.

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In *Kroger*, the authorization permitted, as does the one in this case, transfer of the authorization to any other employer with a union contract. But the issue in *Kroger* was whether the old authorization governed when the employee returned, after a hiatus, to the same employer. The latter situation was not a part of the authorization. The

Board recognized, as the General Counsel acknowledges (Reply Br. 7), that disputes about checkoff provisions “essentially involve contract interpretation rather than interpretation and application of the Act,” citing applicable authorities. Thus, the Board applied a “clear and unmistakable waiver” theory to the case and found that the employee, in his old authorization, did not intend to “have his dues deduction revived when he was reemployed by Kroger.” *Id.* at 849. Significantly, the Board was not considering the language used in a vacuum. The employee had objected to his old authorization form being used upon his return to employment. The case is thus clearly distinguishable from the situation here. But the Board’s analysis suggests that language permitting transfer to a new employer would be a proper waiver. Significantly, here, the authorizations clearly permitted transfer not only to a new employer, but also to the same employer after a hiatus.

Contrary to the General Counsel’s position, Section 302(c)(4) “does not require that an employee be free to revoke the check-off whenever he changes employers.” *Associated Builders and Contractors v. Carpenters Vacation and Holiday Trust Fund*, 700 F.2d 1269, 1276 (9th Cir. 1983). The General Counsel asserts (Reply Br. 7) that the Ninth Circuit decision is not binding on the Board but does not dispute the court’s statement as to the statutory meaning. Nor is any contrary authority cited. The General Counsel does cite (Reply Br. 8) *WKYC-TV, Inc.*, 359 NLRB 286, 289 n. 13 (2012) for the proposition that the Board may properly consider arguments relating to Section 302 in unfair labor practice cases. But, surely, in that context, the Board is able to also consider whether, as here, there is no violation of Section 302.

In these circumstances, particularly where there is no violation of Section 302(c)(4), there is really is no support for the General Counsel’s allegation that the transferability language in the checkoff authorization signed by the employees, by itself, amounts to restraint or coercion or a violation of the duty of fair representation. Accordingly, this allegation of the complaint is dismissed.

The Failure to Give Specific Dates in Rejecting the Charging Party’s Untimely Revocation

The General Counsel also alleges (Br. 18-19) that Respondent violated the Act by initially rejecting the Charging Party’s untimely request to revoke her checkoff authorization. The authorization signed by the Charging Party clearly sets forth the window periods within which the annual revocation is to be submitted. Those window periods—keyed to the termination date of the bargaining agreement and to the date of the authorization—are consistent with Section 302(c)(4). The revocation was indeed untimely, as Respondent properly pointed out, because window periods such as those voluntarily agreed upon here are proper limitations on revocations. See *Frito-Lay, Inc.*, 243 NLRB 137, 139 (1979). But, in its response, Respondent also carefully reminded the Charging Party of the date she signed her authorization, which actually specified the date of that annual requirement, and also mentioned the other annual requirement, namely the termination of the collective bargaining agreement. The General Counsel asserts that the Respondent should have gone further and has an affirmative duty to spell out the specific dates within which the revocation can be submitted. No case law

is cited in support of this affirmative duty. I assume the General Counsel would require a union to tell an employee something like this to cover both window periods: "You may revoke your authorization between September 15, 2020 and October 1, 2020 [window period from signing date] or between November 30, 2020 and December 15, 2020

[window period from contract termination date]"⁷ It is hard to see how there can be any restraint or coercion in failing to spell out such specific dates, especially since it does not require a degree in mathematics to compute the specific appropriate dates from the authorization itself. Nor is there here the type of misrepresentation or bad faith in such failure that would bring into play a violation of the duty of fair representation.

Accordingly, this allegation is also dismissed.⁸

Conclusion of Law

Respondent has not violated the Act in any way.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended⁹

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., April 20, 2020



Robert A. Giannasi
Administrative Law Judge

⁷ These are not actual dates but illustrations of what would be required under the General Counsel's theory.

⁸As Respondent points out, at the appropriate time, Respondent not only permitted the revocation, but reimbursed the Charging Party all dues paid from the date of her revocation letter, even though the revocation would only have been valid as of a later date. Thus, the essence of the alleged violation—notification of the specific dates in the window period—was cured; indeed, more than cured. In these circumstances, even if there were a violation in a purely technical sense, this is uniquely the type of case that should be dismissed because the matter has been "substantially remedied or effectively contradicted by subsequent conduct." *Dish Network Service Corp.*, 339 NLRB 1126, 1128 fn. 11 (2003).

⁹ If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the finding, conclusion, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.